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FM AMCONSUL HONG KONG
TO RUEHC/SECSTATE WASHDC PRIORITY 7718
INFO RUEHOO/CHINA POSTS COLLECTIVE PRIORITY
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UNCLAS SECTION 01 OF 02 HONG KONG 002850

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NSC FOR DENNIS WILDER
DEPT FOR EAP/CM

E.O. 12958: N/A

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SUBJECT: HIGH COURT RULES ON COVERT SURVEILLANCE CASE

REF: HONG KONG 0523

11. (SBU) Summary: On July 12, the Hong Kong Court of Final Appeal (CFA) struck down a February lower court ruling that had granted six-month "temporary validity" to the Government's covert surveillance and wiretapping operations, despite the lower court's finding that such operations were unconstitutional. The six-month grace period was meant to give the Government an opportunity to enact corrective legislation without disrupting normal investigative operations, but the CFA found that the lower court had gone too far in granting "temporary validity." Recognizing the need to avoid a legal vacuum, the CFA instead substituted a "suspension" of the declarations of unconstitutionality for a period of six months from the date of the lower court's original ruling. The practical effect of this is that the Government will still have until August 8 to enact corrective legislation but, importantly, will not be shielded from legal liability for its unconstitutional surveillance operations, as had been the case under the lower court's "temporary validity" order. End Summary.

12. (SBU) The CFA on July 12 overturned a lower court decision granting "temporary validity" to the Government's covert surveillance and wiretapping operations for a period of six months. In that earlier decision, issued on February 9, 2006, High Court Justice Michael Hartman ruled that Chief Executive Donald Tsang's August 2005 executive order authorizing covert surveillance was "an administrative order having no legislative effect" (see ref). Hartman also ruled that Section 33 of the decades-old Telecommunications Ordinance was unconstitutional because it authorized access to, or the disclosure of, the contents of intercepted communications in violation of Articles 30 and 39 of the Basic Law, which guarantee the right to free and private communications. Hartman accepted, however, the Government's petition to grant "temporary validity" to both the executive order and the Telecommunications Ordinance for a period of six months to allow the Government time to enact corrective legislation. Hartman admitted that his ruling was "unusual" and "exceptional" but justified it by arguing that the prospect of a legal vacuum constituted "a real threat to the rule of law." As precedent for his decision, Hartman relied heavily on a Canadian decision in which the court granted "temporary validity" to nearly all of the laws on the books in Manitoba Province, despite having declared those laws unconstitutional because they were not written in both French and English.

A Victory for Long Hair, But Little Practical Effect

13. (SBU) The plaintiffs in that case, legislator "Long Hair" Leung Kwok-hung and fellow activist Koo Sze-Yiu, appealed Hartman's "temporary validity" ruling to the CFA. In its unanimous decision, CFA Justice Kemal Bokhary said "The scenario in the present case is nothing like a virtual legal vacuum or a virtually blank statute book (referring to the Canadian case). It is by no means as serious as that. I see nothing to justify temporary validity in the present case." Bokhary added, however, that "All things considered, I am of the view that the danger to be averted in the present case is of a sufficient magnitude to justify suspension." Bokhary concluded that "I would allow the appeal to set aside the temporary validity order. In its place I would, to afford an opportunity for the enactment of corrective legislation, substitute suspension of the declarations of unconstitutionality so as to postpone their coming into operation, such postponement to be for six months from the date of Hartman's judgment of 9 February 2006."

14. (SBU) The practical effect of the CFA's ruling is that the Government will still have until August 8 to enact corrective legislation. However, it will not be shielded from legal liability for its unconstitutional surveillance operations, as had been the case under Hartman's "temporary validity" ruling. Bokhary made this point explicit by saying "The Government can, during that period of suspension, function pursuant to what has been declared unconstitutional, doing so without acting contrary to any declaration in operation. But, despite such suspension, the Government is not shielded from legal liability for functioning pursuant to what has been declared unconstitutional."

15. (SBU) Outside the court, Leung and Koo opened a bottle of champagne in front of television cameras to celebrate their victory. They called on Donald Tsang to make a public

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apology for his unconstitutional act, and to promise not to do it again. The Government has not yet reacted to the ruling. Leung and Koo, both of whom claim to be targets of covert surveillance and wiretapping, say they intend to file a lawsuit against the Government for unconstitutional surveillance.
Sakaue